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Supreme Court, U.S.
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No. 95-599

In The

Supreme Court of the United States

October Term, 1995

ILLINOIS CENTRAL RAILROAD,

Petitioner,

vs.

STEVE DeBIASIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court grant certiorari to consider a legal defense that was neither raised in the lower court nor supported by the evidence?

2. Did the District Court abuse its discretion in excluding certain evidence as a discovery sanction because it was not disclosed before trial?

3. Did the Seventh Circuit correctly decide that a purported error in excluding certain evidence was harmless when other undisputed evidence conclusively established a violation of the Safety Appliance Act?

4. Should the Supreme Court grant certiorari to render an advisory opinion concerning whether "impact speed" is a valid defense to a claim under the Safety Appliance Act, in a case where Petitioner-Railroad merely presented speculation that impact speed "*might*" have caused the failure of its equipment to automatically couple?

STATEMENT OF THE CASE

Petitioner complains about the District Court's decision to exclude certain testimony about a coupler (Exhibit 33). [Pet. for Cert. at 8-10.] But testimony about Exhibit 33 was excluded as a **sanction** because of Petitioner's conduct in failing to disclose this evidence before trial. *DeBiasio v. Illinois Central*, 52 F.3d 678, 686 (7th Cir. 1995).

The Court of Appeals decided the error in the exclusion was harmless because Exhibit 33 "would have only addressed whether the coupling mechanism on car 388423 was defective." *DeBiasio*, 52 F.3d at 686.

A violation of the Safety Appliance Act can be established both by proof that a coupler was defective and, alternatively, by establishing that it failed to automatically couple on impact. *DeBiasio*, 52 F.3d at 683. The excluded evidence was relevant only on the issue of whether the coupler was defective. *DeBiasio*, 52 F.3d at 686.

Respondent, however, "presented **undisputed** evidence that the couplers had failed to couple automatically upon impact." *DeBiasio*, 52 F.3d at 686 (emphasis added). This evidence proved a violation of the Safety Appliance Act, "**even if DeBiasio had never presented any evidence of a defect.**" *DeBiasio*, 52 F.3d at 686 (emphasis added).

Because of the "undisputed" evidence of failure-to-couple, and the fact that Petitioner "failed to provide any evidence to support a misaligned drawbar or closed knuckle defense, no reasonable jury could have failed to find such a violation. Thus the error could not have affected the result of the trial." *DeBiasio*, 52 F.3d at 686.

The "undisputed" evidence of failure-to-couple obviated any need for expanding the scope of the court's harmless error analysis to consider the evidence that Respondent's injury was also caused by Petitioner's violation of its operating rules (as well as other acts of negligence which were independent of a coupler defect). The Seventh Circuit, however, noted "there was clearly evidence introduced to support **each** theory of negligence." *DeBiasio*, 52 F.3d at 685 (emphasis added).

Petitioner focuses on the penultimate sentence of the harmless error analysis (where the Seventh Circuit acknowledged that railroads can defend against Safety Appliance Act claims with a "misaligned drawbar or closed knuckle defense"). According to Petitioner, the court supposedly deprived it of the opportunity to assert, as a defense, that its equipment supposedly failed to couple because of the "operational circumstance" of "the impact speed of the cars to be coupled." [Pet. for Cert. at 11.]

In support of its "impact speed" defense, Petitioner relies on speculation that a coupler **might** fail to couple **if** it is "pushed away due to the impact speed before the open knuckle closes." [Pet. for Cert. at 7.] No witness is identified as having testified that "impact speed" caused the failure to couple in the present case.

Similarly, Petitioner does not claim that it presented any evidence in support of either a misaligned drawbar or closed knuckle defense. As the Seventh Circuit observed, "other than asking a few hypothetical and conjectural cross-examination questions of DeBiasio and his witnesses, IC introduced no evidence to support a misaligned drawbar or closed coupler defense. To the contrary, the evidence indicated no support for such defenses existed." *DeBiasio*, 52 F.3d at 684.

Tacitly assuming that it presented sufficient evidence to raise an "impact speed" defense, Petitioner attacks the Seventh Circuit's harmless error analysis as having supposedly ruled "as a matter of law that the **only two defenses available** to a railroad to a [Safety Appliance Act] claim are the operational circumstances of a misaligned drawbar and closed knuckle." [Pet. for Cert. at 10. (emphasis added).]

REASONS FOR DENYING THE WRIT

Petitioner seeks certiorari to argue the legal validity of a defense that wasn't raised in the lower courts, and isn't supported by any evidence.

The Seventh Circuit had no reason to think it was being asked to consider whether "impact speed" constitutes a defense in a Safety Appliance Act case. This issue wasn't raised in Petitioner's opening brief before the Seventh Circuit. And Petitioner is only able to present speculation that its couplers "might" have failed to couple "due to the speed of the impact." [Pet. for Cert. at 10.]

Neither the District Court nor the Court of Appeals were presented with the legal issue of whether "impact speed" is a valid defense in a Safety Appliance Act case. The petition for certiorari therefore calls for application of the general rule that "ordinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

All of Petitioner's arguments about "impact speed" and "operational circumstances" are irrelevant to the Seventh Circuit's harmless error analysis. The error in excluding testimony about Exhibit 33 was harmless because there was undisputed evidence of failure to couple. This conclusion is

bolstered by all the evidence of multiple acts of negligence which were independent of any defect in the coupler.

Granting certiorari will merely lead to a re-examination of the unique facts and circumstances of this case, in revisiting the issues of whether the trial judge erred in excluding testimony as a discovery sanction, and whether the Seventh Circuit correctly concluded that an "apparent" error was harmless. Petitioner has inexplicably ignored the Supreme Court's blunt message: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Yet that is precisely the task Petitioner is asking the Supreme Court to undertake.

CONCLUSION

The Supreme Court should not accept Petitioner's invitation to render an advisory opinion concerning whether "impact speed" is a valid defense in a Safety Appliance Act case. Petitioner merely presented speculation that this "might" have caused the accident which resulted in the amputation of Respondent's dominant arm at the shoulder. The petition should be denied.

Respectfully submitted,

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